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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1136

BROWN & ROOT, INC. AND TRAVELERS INSURANCE COMPANY,

Petitioners

versus

MARY M. JOYNER, (widow of ARTHUR E. JOYNER), BENJAMIN F. STEWART and the BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,

Respondents

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN OPPOSITION SUBMITTED BY FEDERAL PARTY-IN-INTEREST

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The Petitioners herein, Brown & Root, Inc. and Travelers Insurance Company, submit

their Brief in reply to the Brief in Opposition submitted by the Federal Party-In-Interest. In doing so, said Petitioners do not waive their objections to the untimely filing of the Brief in Opposition by said Federal Party-In-Interest.

NEW ISSUES RAISED BY
THE BRIEF IN OPPOSITION

I. THAT THE FACTS SUPPORT AN ASSERTION THAT THE CLAIMANT-RESPONDENTS WERE INJURED IN, WITHIN OR ON THE FLOOR OF A DRYDOCK.

II. THAT "TRADITIONAL" MARITIME EMPLOYMENT IS FOUND IN PRE-1972 CASE LAW AND THAT SUCH SHALL BE A GUIDE FOR MAKING THE MARITIME EMPLOYMENT DETERMINATION OF SECTION 2(3) OF THE ACT.

III. THAT THE CLAIMANT-RESPONDENTS WERE "HARBOR WORKERS" WITHIN THE MEANING OF THAT TERM AS IT APPEARS IN THE ACT.

IV. THAT THE REMAND OF PERINI NORTH RIVER ASSOC. v. FUSCO, NO. 79-759, CURES THE CONFLICT NOW EXISTING AMONG THE CIRCUITS.

V. THAT THE SITUS REQUIREMENT OF SECTION 3(A) OF THE ACT IS SATISFIED BY A CONSTRUCTION SITE'S PREVIOUS CONDITION, COMBINED WITH ITS "INTENDED USE".

ARGUMENT

1. In order to determine the threshold question of coverage under the Longshoremen and Harbor Worker's Compensation Act,[1] the facts of the claimant's employment and the locality of his injury must be understood. As stated by this Court in P.C. Pfeiffer Co., Inc. v. Ford, U.S. 100 S.Ct. 328 (1979), the amended Act prescribes two tests, one of status[2] embodying the concept of the nature of the claimant's occupation, and another of situs[3], invoking the geographical limitations of the Act itself. Without a thoughtful,

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[1]33 U.S.C. Section 901 et seq. as amended, 1972, hereinafter referred to as the Act.

[2]Section 2(a); 33 U.S.C. 902(3), hereinafter referred to as the status or maritime employment test or requirement.

[3]Section 3(a); 33 U.S.C. 903(a), hereinafter referred to as the situs test or requirement.

accurate analysis of the facts, no interpretation of the coverage provisions of the Act can give adequate guidance to those who must obey and interpret this law.

The facts are presented by the Federal Party-In-Interest, in a way that is misleading. To the extent that this reflects the approach taken by the Fourth Circuit, it is contrary to this Court's requirement, as stated in P. C. Pfeiffer Co., Inc. v. Ford, supra, that the claimant's overall employment function be considered.

To say that the Claimant-Respondents herein were "engaged in" building a drydock, is to mislead by implying that construction work associated with the drydock was their exclusive or paramount activity. Indeed, the contrary was most probably true. The plain fact is that both Claimant-Respondents were doing work ordinarily associated with their construction occupations, on this parti-

cular job site, in the vicinity of a drydock under construction. The drydock under construction, was only one of many parts of an overall construction project. The Claimant-Respondents were not injured upon navigable waters as same has been interpreted at any time during the pre-amendment history of the Act. They were injured on dry land, They were not injured within, in or on the floor of any drydock, under construction or otherwise.

2. The Federal Party-In-Interest maintains that the Fourth Circuit has gone beyond a rote application of pre-1972 case law, and has reached its result as to the Claimant-Respondents by determining what is "traditional" maritime employment for employees not engaged in handling cargo. The guideline for this determination is evidently that welter of pre-1972 case law dealing with the "maritime but local" doctrine. This accentuates, rather

than cures, the conflict in approach between the Fourth Circuit and the Fifth and Ninth Circuits, which has produced such divergent results.

Although the Petitioners herein would not employ pre-1972 case law to make the maritime employment determination, they would note that the Federal Party-In-Interest's interpretation of the Fourth Circuit's opinion would place it squarely in conflict with this Court's decision in Pennsylvania Railroad Co. v. O'Rourke, 44 U.S. 334, 73 S.Ct. 302 (1953). In O'Rourke, this Court found that a railroad employee was covered under the Act when he fell from a railroad car, as same was being unloaded from a floating barge. In support of its affirmation of coverage, which admittedly ignored the railroading nature of the claimant's work and admittedly rejected the argument that the employee must have a status of "maritime employment" under the Act as it then appeared,

the Court held that compensation was payable, the nature of the railroad employee's work notwithstanding. This Court stated:

> "Compensation under the Harbor Worker's Act could not have been paid in connection with his (the railroad employees) death if we were to test its applicability by the nature of his regular work. A number of lower court cases are in a similar vein. Those we collect in the margin deal with various types of construction and service workers, obviously not themselves engaged in traditional 'maritime employment', if one were to look solely to the particular type of job they were engaged for."[7]
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> [7] Baizley Iron Works v. Span, 281, U.S. 222, 50 S.Ct. 306, 74 L.Ed. 819 (a painter); De Bardeleben Coal Corp. v. Henderson, 5 Cir., 142 F.2d 481 (member of shore gang); Travelers Insurance Co. v. McManigal, 4 Cir. 139 F.2d 949 (carpenter); Travelers Ins. Co. v. Branham, 4 Cir. 136 F.2d 873 (foreman of a concrete pouring gang); Standard Dredging Corp. v. Henderson, D.C. 57 F. Supp. 770 (member of shore gang); Ford v. Parker, D.C. 52 F. Supp., 98 (watchman). This list is illustrative but by no means exhaustive. (Emphasis added).

If the Federal Party-In-Interest and the Fourth Circuit hold that Travelers Insurance Co. v. McManigal, 139 F.2d 949 (4th Cir. 1944), Travelers Insurance Co. v. Branham, 136 F.2d

873 (4th Cir. 1943), and Newport News Shipbuilding & Drydock Co. v. O'Hearne, 149 F.2d 968 (4th Cir. 1951), define what is "maritime employment", then they are clearly in conflict with this Court.

3. The Federal Party-In-Interest has stated that the Claimant-Respondents herein were "harbor workers". Although the Fourth Circuit specifically avoided the determination of whether the definition of "harbor worker", proposed by the Benefits Review Board, was in conformance with the intent of Congress, the Federal Party-In-Interest has applied the label "harbor worker", and proposes that the application of the label brings the Claimant-Respondents within the terms of the Act.

The term "harbor worker" is nowhere defined in the Act, and the term is not addressed in the legislative history of the 1972 amendments of the Act. If, as asserted by the Federal Party-In-Interest, the Fourth

Circuit has applied a label, without fully analyzing the job functions of the claimants under all surrounding facts, then the Fourth Circuit is in conflict with this Court's direction in P.C. Pfeiffer Co. v. Ford, supra.

4. The remand of Perini North River Assoc. v. Fusco, No. 79-759, vacated and remanded January 14, 1980, does not cure the conflicts which now exist between the Fourth Circuit and the Fifth and Ninth Circuits. Rather, the Court's remand creates a situation wherein the Second Circuit must decide the same issue as presented here. Without direction from this Court, it is likely that the Second Circuit's decision, whatever be its result, will be petitioned to this Court. Judicial economy will not be served by delaying the consideration of this question by refusing the petition herein.

5. The situs question addressed in the case of Jacksonville Shipyards, Inc. v.

Perdue (Skipper), 539 F.2d 533 (5th Cir. 1976), is the only post 1972 dicusssion of that test in terms of time frame. The Fifth Circuit's decision squarely supports the Petitioners' position that a shipyard under construction, although on fill land, was not part of "navigable waters" as that term appears under the amended Act. The conflict with the Fourth Circuit's decision herein, cannot be erased.

Although the Petitioners do not agree with the analysis, if the Federal Party-In-Interest and the Fourth Circuit are to maintain that pre-1972 case law is applicable to the issues herein, then the cases of Motteler v. J. A. Jones Construction Co., 457 F.2d 917 (7th Cir. 1972) (decided under the old Act) and Massman Construction Co. v. Bassett, 30 F. Supp. 813 (1940), rev'd on other grounds, 120 F.2d 230 (8th Cir. 1941) cert. denied 314 U.S. 648, 62 S.Ct. 92, must be considered. In

both cases, construction worker-claimants were injured within the confines of coffer dams. Such dams are used to facilitate construction and render dry land, what had previously been navigable waters. In both cases, the Courts recognized that navigable waters could cease to be such, by the efforts of man. The fact that coffer dams are impliedly temporary structures, the fact that same would eventually be removed, and thereafter, the navigable waters returned, was not thought by these Courts sufficient to deny the obvious. The enclosed land was no longer water. Its future use or condition had no bearing on the issues at hand. Under the logic employed by the Federal Party-In-Interest, the Fourth Circuit would therefore, be rendered in conflict with the Seventh and Eighth Circuits on the situs issue.

The "intended use" test, ascribed by the Federal Party-In-Interest to the Fourth Circuit,

likewise, has no support in logic. The Fourth Circuit clearly erred in its situs analysis, by placing the Claimant-Respondent inside the drydock at the time of their injuries. This was clearly contrary to the facts. The error cannot be salvaged by the Federal Party-In Interest's construction of an "intended use" test.

CONCLUSION

To resolve the conflict among the Circuits and to resolve important issues of statutory construction now vexing the lower Courts and the parties that must be guided thereby, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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